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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 632nd MEETING

Held at Headquarters, New York,
on Monday, 1 June 1998, at 10 a.m.

Temporary Chairman: Mr. CORELL (The Legal Counsel)

later: Mr. MAZILU (Romania) (Chairman)

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98-80709 (E)

The meeting was called to order at 11 a.m.

OPENING OF THE SESSION

1. Mr. CORELL (Temporary Chairman) said that, in the light of the continuing financial crisis of the United Nations, the Secretariat's capacity to service meetings, which included the translation and timely distribution of documents, was limited. Owing to the freeze on recruitment and promotion, the United Nations Commission on International Trade Law (UNCITRAL) at its thirtieth session had had to operate with three out of 10 posts vacant. The recent recruitment of a legal officer had reduced the number of vacant posts to two. The fact that the Commission had managed to limit the negative impact of that situation on its work was a major achievement. While he intended to continue his efforts to restore the Secretariat to its previous strength, document availability and translation would continue to be affected by the financial crisis.

2. In the past year, the Commission had continued its training and assistance programme in spite of the shortage of human resources and the substantial decrease in the funds available in the Trust Fund for UNCITRAL Symposia. The Commission's preparation of legal texts was complemented by the important training, information and technical assistance programme carried out by the Secretariat, which benefited developing countries and countries with economies in transition. He invited Member States to work closely with the Secretariat in order to ensure that the conventions and model laws formulated by the Commission were given due regard in that process. He also invited States, organizations and individuals to contribute to the Secretariat's technical assistance activities by making voluntary contributions to the Trust Fund for UNCITRAL Symposia. Since balanced representation was a requirement for worldwide acceptance of legal texts, he appealed to States to contribute to the UNCITRAL Trust Fund for Travel Assistance.

3. Since its thirtieth session, the Secretariat had organized several seminars and briefing missions and participated in a number of events in which the Commission's texts had been discussed and promoted. The Secretariat had also sought to achieve greater coordination with multilateral funding agencies.

4. The Secretariat had organized a special event for 10 June 1998 to commemorate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It had also organized a Uniform Commercial Law Information Colloquium designed to provide concise information on current and possible future work items in the areas of electronic commerce, project and receivables financing and cross-border insolvency.

5. The first topic that the Commission would consider at its current session was the draft legislative guide on privately financed infrastructure projects. The purpose of the guide was to assist national authorities and legislative bodies in establishing a legal regime aimed at achieving the appropriate balance between the need to facilitate private participation in infrastructure projects and the need to foster the interests of the host Government and the public. At its thirtieth session, the Commission had considered a number of chapters of the

guide. At its current session, the Commission would consider a document setting out the proposed structure of the guide. The Commission might wish to consider whether the guide should include only an analysis of the relevant issues or also legislative recommendations in the form of sample provisions. It might also wish to consider the procedure to be followed in the preparation of the guide, including the question of whether the review of the remaining draft chapters of the guide should be entrusted to a working group.

6. The next topic that the Commission would consider was the Model Law on Electronic Commerce. The incorporation of data into an electronic message by reference to another source was an important aspect of electronic commerce. The Working Group on Electronic Commerce had discussed the issue in detail and come up with a draft provision that the Commission might wish to include in the Model Law.

7. The third topic was the draft Convention on Assignment in Receivables Financing. At its current session, the Commission would have before it the reports of the Working Group on International Contract Practices on the work of its twenty-seventh and twenty-eighth sessions.

8. The Commission would also consider the topic of training and technical assistance. Owing to the success of the Commission's texts and to the emergence of a number of new countries, there had been a dramatic increase in the number of requests for seminars and symposia and for technical legal assistance. The Secretariat had therefore found itself saddled with an increased workload, while its resources had been depleted.

9. The Case Law on UNCITRAL Texts (CLOUT) had also contributed to the Secretariat's workload. That system was aimed at the ultimate stage of unification and the uniform application and interpretation of the Commission's texts. As more and more of the Commission's texts were adopted by a growing number of States, there was a vital need to provide a comprehensive system to contribute to a harmonized interpretation of those texts.

ELECTION OF OFFICERS

10. Mr. GLATZ (Hungary) nominated Mr. Mazilu (Romania) for the office of Chairman.

11. Mr. Mazilu (Romania) was elected Chairman by acclamation.

12. Mr. Mazilu (Romania) took the Chair.

13. The CHAIRMAN said that the election of three vice-chairmen and a rapporteur would be deferred to a future meeting.

ADOPTION OF THE AGENDA

14. The agenda was adopted.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/444 and Add.1-5)

15. Mr. ALABRUNE (France) said that his delegation was concerned at the delays that had occurred in the distribution of documents in the various official languages, particularly in French. Such delays made it difficult for members of the Commission to prepare for sessions of the Commission and its working groups. He therefore urged that his delegation's concern should be conveyed to the Secretariat and the translation services in order that such delays could be avoided.

16. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat was fully aware of the problem of delays in the translation of documents. In Vienna, the problem of timely translation of documents into French was a particular problem, since for the past few years there had been a number of vacancies for French translators in the French translation section. The translation sections in Vienna also translated documents for other United Nations bodies that sometimes received priority over documents for the Commission. As Secretary of the Commission, he had protested against that practice and had pointed out that the Commission always adhered to the 10-week deadline for the submission of documents for translation. However, delays in the translation of documents were not only an internal problem of the Secretariat. Governments of Member States also contributed to the problem by insisting on the translation of documents in which they had a particular interest. At the Commission's thirtieth session, he had indicated that one way of indirectly improving the situation was to hold fewer sessions of the Commission's working groups and to space them differently.

17. Mr. CHOUKRI (Observer for Morocco) said that the problem mentioned by the French delegation also affected the translation of documents into Arabic. Since his delegation had prepared for the current session on the basis of previously issued documents, it would have to reconsider the issues on the basis of the new documents, which had only just become available in Arabic. He understood the difficulties mentioned by the Secretary, but urged the Secretariat to make every effort to provide the material means by which those difficulties could be overcome.

18. Mr. HERRMANN (Secretary of the Commission) said that the draft chapters of a legislative guide on privately financed infrastructure projects had been prepared in cooperation with outside experts and other international organizations, with the aim of achieving the ideal combination of public and private partnership for the elaboration of the texts. In particular, the Secretariat had cooperated closely with the World Bank in preparing the draft chapter contained in document A/CN.9/444/Add.3. He had been pleased to note the interest which practitioners had taken in the project, since it showed that the legislative guide represented a worthwhile effort that would meet a real need.

19. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that, in 1996, the Commission had decided to prepare a legislative guide on build-operate-transfer (BOT) projects, based on a comparative study of national legislation in that area. At its thirtieth session, the Commission had considered draft chapters on the scope, purpose and terminology of the guide; parties and phases of privately financed infrastructure projects; and preparatory measures, and had

renamed the draft "Legislative guide on privately financed infrastructure projects" because BOT was only one of the modalities under which such projects were carried out. With the help of outside experts from the public and private sectors, and in cooperation with international organizations such as the World Bank, regional development banks, the International Finance Corporation (IFC), the United Nations Industrial Development Organization (UNIDO) and the Economic Commission for Europe (ECE), those chapters had been revised and additional chapters had been drafted. The Secretariat had continued to compile and analyse national legislation on the subject, and hoped that more countries would forward copies of relevant national laws.

20. Document A/CN.9/444 gave an overview of the project's structure and content, as proposed by the Secretariat. The draft introduction to the guide was contained in document A/CN.9/444/Add.1. The draft chapters for consideration at the current session were chapters I ("General legislative considerations"), II ("Sector structure and regulation"), III ("Selection of the concessionaire") and IV ("Conclusion and general terms of the project agreement"), contained in documents A/CN.9/444/Add.2, Add.3, Add.4 and Add.5, respectively. Each of the draft chapters consisted of two parts: a set of legislative recommendations and a set of annotations explaining the background, scope and purpose of each recommendation, as well as the practical issues which might arise in connection with the projects. No model provisions had been included in the draft chapters.

21. He suggested that the Commission should devote the first week of the current session to the discussion of documents A/CN.9/444 and Add.1 to Add.5. Much of the content of those documents was not new, but only a revision of earlier drafts which had been considered at the Commission's last session. In addition, he drew attention to a note by the French delegation on privately financed infrastructure projects, which had been circulated as document A/CN.9/XXXI/CRP.2.

22. Mr. KOVAR (United States of America) said he wished to congratulate the Secretariat on the superb effort it had made in preparing a comprehensive, nuanced and substantial draft legislative guide on privately financed infrastructure projects. That was a very important and very broad area in which the Commission could make a positive contribution to the efforts of countries to attract private capital to support national development goals. In the interest of tailoring the legislative guide to the needs of national authorities, he wondered whether some of its 11 draft chapters could be combined so as to shorten the guide.

23. The formulation of the legislative recommendations in the form of sample provisions, as suggested in paragraph 31 of document A/CN.9/444, could enhance the usefulness and impact of the guide, and he hoped that the Commission would slightly refocus its efforts with a view to preparing model legislative provisions. Moreover, in view of the vast scope and importance of the topic, he proposed that the project should be carried out in phases. The first outcome could be a set of model legislative provisions supplemented by analysis and commentary. A possible future step could be the preparation of more practical or sector-oriented user guides. In any case, he hoped that the Commission would

not feel compelled to complete the entire project in the next 12 months, but would take the time needed to prepare a genuinely useful legislative guide.

24. Ms. NIKANJAM (Islamic Republic of Iran) said that her delegation agreed that some of the chapters of the draft guide should perhaps be combined. It might also prove valuable to develop model laws or regulations for use by Governments.

25. Mr. KASHIWAGI (Japan) said it was important to remember that the subject covered by the draft legislative guide was very broad. In his view, the analysis it contained was accurate, evocative and well written. However, the concepts it contained, in particular that of build-operate-transfer (BOT), might prove difficult for laymen to understand. Since the legislative guide was intended for use throughout the world, and particularly in developing countries, it should be redrafted in simpler language.

26. Mr. RAO (India) said that, in his Government's view, a balance must be struck between, on the one hand, the interests of private companies that carried out infrastructure projects in cooperation with host Governments and, on the other, the needs of the users of such services. The legislative guidelines should not only promote investment and protect private companies but also accord with the host Government's public policy and protect the economic interests of citizens and users. India nevertheless supported the general thrust of the guidelines and welcomed the Commission's decision to assemble expert knowledge for that purpose.

27. Mr. ALABRUNE (France) said that his delegation supported the views of the United States of America, in particular the notion that model provisions should be developed to accompany the legislative guide. France felt, however, that model contracts would be more workable and useful than model laws. In general, France supported the general structure of the draft guide, and would later broach some terminological issues.

28. Mr. LALLIOT (France) drew attention to the conference room paper (A/CN.9/XXXI/CRP.2) which his delegation had circulated to the members. French law drew a distinction between public contracts and public service delegation agreements; the use of the latter was new in France and supplanted the traditional concept known in French as concessions of public works or public services. That concept was in fact very similar to the notion of privately financed infrastructure projects, also called BOT projects. The issue was not merely one of terminology; the form, in fact, determined the content. In broad terms, France supported the draft legislative guide, with a number of exceptions, involving both form (choice of vocabulary) and content (the legal principles employed). In particular, the distinction should clearly be drawn between marchés publics (public contracts)and concessions of public works or public services. That was a fundamental legal issue, involving the manner in which the legal contractor received remuneration. What was original and unique about the BOT project was its ability to combine market-oriented forces and the general interest; it was essential to preserve the fragile equilibrium between the two throughout the draft guide.

29. That should not be considered merely a French problem. It was in the interests of all European Governments to seek the clarification of those concepts, which were elements of Community law.

30. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the matter of terminology was of course a question not only of form but of content. The Secretariat, aware that certain terms posed difficulties within the legal traditions of certain countries, had given great thought to the use of the terms "concession" and "concessionaire" and had ultimately decided to retain them because they were the terms currently most widely used. It would nevertheless be grateful to all delegations for clarifications concerning any vocabulary contained in the draft guide. The use of those terms could perhaps be thoroughly considered during the discussion of chapter I, concerning general legislative considerations, and chapter III, concerning the selection of the concessionaire.

31. Mr. RENGER (Germany) said that his delegation had expected that the draft guide could be finalized during the current session; it was therefore puzzled and troubled by suggestions that model laws or model contracts should accompany the text. The Commission should not, in view of both time and resource constraints, embark on new considerations.

32. Mr. GUISLAIN (Observer for the World Bank) said that the World Bank was assisting a large number of countries in their transition to more competitive infrastructure sectors. The Commission was assisting in a major worldwide shift from state monopolies to market systems. The legislative guide should seek to assist countries in managing that transition at their own pace, and should above all not stifle a naturally evolving process by legislating a kind of common ground. In many countries, legislation needed to be adapted to the changing realities; the State, no longer a producer, had a new role to play, that of facilitator and regulator. Legislation was necessary to remove barriers to competition and to regulate the provision of services, with a view to controlling the tendency towards monopoly. The Commission should strive to focus on essential legislative issues and avoid discussing details that varied from country to country. He welcomed the notes on legislative recommendations and noted that it might prove valuable to create a vade-mecum for legislators, which would focus on the key legislative principles and issues. Establishing overly specific provisions entailed the risk that legislators would focus on the text instead of on basic principles, which countries should be able to adapt to their particular legal traditions.

33. Mr. RESTREPO-URIBE (Colombia) said that his delegation offered its full cooperation in the finalization of the draft legislative guide, and would willingly provide information on Colombian legislation and regulations governing infrastructure projects as well as on the status of projects recently in development.

34. Mr. CHOUKRI (Observer for Morocco) said that his delegation was fully convinced of the need for a draft legislative guide that would allow States to inject clarity into their legislation and decide for themselves how the legislation could best serve the interests of domestic enterprises as well as foreign investors. Such a guide should also provide an unambiguous legislative

framework for the entrepreneurial activities of nationals of those States. However, it would be awkward if not impossible for the Commission to adopt a model law addressing the substance of public policy issues such as land ownership, intellectual or industrial property concessions, technology transfers or the judicial or arbitration systems. The draft legislative guide should therefore be aimed solely at enabling States to improve their legislation on a voluntary basis.

35. Ms. ALLEN (United Kingdom) said that her delegation also supported the drafting of model legislative provisions, but noted that such a process would be very time-consuming. It would therefore be essential to form a working group to carry out the necessary preparations within the Commission's schedule.

36. Mr. LIU Yang (China) said that his delegation supported the preparation of a draft legislative guide. The Commission's discussions on the guide would facilitate China's domestic legislation and provide guidance on regulating foreign investment. His delegation also agreed that some chapters of the draft guide should be merged, and that the Commission should concentrate its discussions on ways to balance the rights and obligations of corporations and Governments.

37. Ms. GÜRAY (Observer for Turkey) said that her delegation basically agreed that some items in the draft legislative guide should be simplified or combined to the extent possible, but that the complexity of the matters addressed must be taken into account. Clear and detailed guidelines were essential for all parties involved.

38. Mr. ALABRUNE (France) said that his delegation had some reservations regarding the value of the Commission's involvement in drafting model legislative provisions; in view of the difficulty of drafting truly comprehensive model legislation, it would perhaps be more effective to concentrate on providing model contracts. His delegation also harboured reservations with regard to setting up a new working group; a more efficient way to use the Commission's limited resources would be to continue to emphasize the work on electronic commerce and international contract practices with a view to drafting a convention on assignment in receivables financing by the year 2000.

39. Ms. NIKANJAM (Islamic Republic of Iran) said that a model contract as suggested by the French delegation would be very useful for Governments.

40. Mr. HERRMANN (Secretary of the Commission) said that in order to address the issues of the Commission's work format and the possibility of a new working group, there was a need for greater precision in the various proposals being put forward. For example, what type of project, and in which sector, would a model contract be intended to cover? How specific would model legislative provisions need to be? Was there a need to add model legislative provisions to the material the Commission was already considering?

41. He supported the French delegation's view that the idea of a new working group should be approached with caution. He suggested instead that a working group of the whole should be established for a two-week session, prior to the next session of the Commission itself, in order to complete the draft

legislative guide. The project would remain in its current form, with the addition of a number of sample model provisions where appropriate. Full model contracts and model laws would not be included for the present, as the Commission had already discussed the issue of contractual matters and decided against including them in order to avoid duplicating the work of other organizations in the United Nations system.

The meeting rose at 1 p.m.